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July 27, 1999

Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

RECEIVED
JUL 27 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**RE: In the Matter of Amendment of Section 73.202(b), Table of
Allotments, FM Broadcast Stations (Ravenna, Nebraska)
MM Docket No. 99-192: RM -9633
Reply Comments of Central Nebraska Broadcasting Co., Inc.**

Dear Ms. Salas:

Transmitted herewith, on behalf of Central Nebraska Broadcasting Co., Inc., is an original and nine (9) copies of its Reply Comments in the above-referenced proceeding. Should there be any questions, please contact undersigned counsel.

Sincerely,


Vincent A Pepper

Enclosures

No. of Copies rec'd 0+9
List A B C D E

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of:

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations

(Ravenna, Nebraska)

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}
}

MM Docket No. 99-192
RM-9633

**TO: CHIEF, ALLOCATIONS BRANCH
MASS MEDIA BUREAU**

REPLY COMMENTS OF

CENTRAL NEBRASKA BROADCASTING CO., INC.

Pursuant to Section 1.415(c) of the Commission's rules, 47 C.F.R. § 1.415(c) (1998), Central Nebraska Broadcasting Co., Inc., hereby submits the following Reply Comments in the rulemaking proceeding to allot Channel 276C2 at Ravenna, Nebraska. The Notice of Proposed Rulemaking in this proceeding was released on May 21, 1999, DA 99-972, and Mountain West Broadcasting filed supportive comments on July 12, 1999.

As detailed below, the Commission can not adopt the proposed amendment to the FM Table of Allotments without first requiring the submission of financial information from Mountain West. Over the past eight months, Mountain West has filed Petitions for Rulemaking for over 120 separate amendments to the FM Table of Allotments. In each Petition, Mountain West has certified that it will file an application for a construction permit for the new allotment. In addition, Mountain West has filed comments in each proceeding certifying that it would file an application for a construction permit and participate in an auction for each allotment. As

such, Mountain West has certified to the Commission that it will construct nearly 125 FM stations should the Commission grant its Petitions for Rulemaking, and the future construction permit applications.

Clearly, the Commission can not permit Mountain West to abuse the Commission's processes by its flood of "cookie-cutter" Petitions for Rulemaking. Instead, the Commission must require specific financial information from Mountain West that it is financially capable to prosecute each and everyone of its applications that it has certified it will prosecute, and construct each and everyone of the facilities that it has certified it will construct. Until such time that this information is provided, Central Nebraska respectfully requests that the Commission hold this proceeding in abeyance, or dismiss the Petition for Rulemaking.

II. DISCUSSION

Central Nebraska is the licensee of KFGW(AM), KWKY(FM) & KRNY(FM), all Kearney, Nebraska, which would compete directly with the proposed allotment.

Mountain West filed its Petition for Rulemaking in this proceeding on March 25, 1999.¹ Except for the description of the proposed facilities, and the population of the proposed community of license, the Petition is identical to every other petition it has filed in the past eight months. In each Petition, Mountain West provides only:

1. the population of the community,
2. a spacing study,

¹ Similar Reply Comments were also filed on July 21, 1999 in the following proceedings: MM Docket No. 99-156 (Pleasant Dale, Nebraska); MM Docket No. 99-159 (Paxton, Nebraska); MM Docket No. 99-160 (Overton, Nebraska); MM Docket No. 99-161 (Hershey, Nebraska); MM Docket No. 99-162 (Sutherland, Nebraska);

3. the general statement that the allotment would provide "an outlet for local self expression" and "a local communications outlet for warning the [community] area of emergency conditions caused by severe weather or other health hazards."

Mountain West has made no effort to demonstrate that any of its proposed allotments would serve the public interest, convenience and necessity, or that it would result in the "fair, efficient, and equitable" distribution of the broadcast service, as required by Section 307(b) of the Communications Act of 1934. Most important, though, is the fact that Mountain West has stated (almost always in Paragraph 8 of its Petitions) that it "will file an application for a Construction Permit to operate" the proposed facility. As such, Mountain West bases each of its Petitions on its intention to file, prosecute, and if selected, construct, the proposed facility.

The Commission has long required "an expression of interest in a proposed channel in order to conduct the rule making process in an orderly manner." *Santa Isabel, Puerto Rico and Christiansted, Virgin Islands*, 3 FCC Rcd 2336, ¶10 (1988). Such expression, the Commission has stated, is required to prevent "a newly allotted channel [to] lie vacant after the Commission had expended limited resources conducting a rule making proceeding." *Id.*

In fact, the Commission views these expressions of interest as "representations to the Commission." *Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, ¶29 (1990). If such representations are "made by a party, who in fact, lacks the requisite intention to construct and operate the proposed facility", the Commission will consider the statements to be "material misrepresentations within the meaning of Section 73.1015 of the Rules and [the party] would be subject to prosecution pursuant to Section 502 of the Act, forfeiture pursuant to Section 503 of the Act or other appropriate administrative sanctions." *Id.* Indeed, the Commission has specifically warned parties of its willingness to investigate those instances where a pattern exists that a party has filed

petitions for allotments "where no genuine interest exists." *Morristown, New York*, 5 FCC Rcd 6976, ¶ 4 (1990).

As stated above, Mountain West has filed Petitions for Rulemaking, and the Commission has responded by releasing Notices of Proposed Rulemaking, to allot approximately 124 new FM channels in 1999. *See Exhibit One*. Additionally, Mountain West has filed comments in all but 15 of these proceedings stating its intent "that it will file an application for Construction Permit to operate a new station...during any window filing period or its intent to participate in auction process the Commission may conduct for this channel."² Mountain West has committed itself, therefore, to construct 124 new FM stations if awarded a construction permit through the auction process, or pursuant to a filing window.

However, if the past is indeed the prologue, Mountain West is woefully incapable of constructing all of the stations it has proposed to construct. As detailed in its Applications for Construction Permit for Commercial Broadcast Station (FCC Form 301) that it currently has pending, Mr. Michael, the principal of both Mountain West and "Michael Radio Group" apparently intends to construct and operate his stations for three months without revenue for less than \$50,000. Attached as *Exhibit Two* are the "Financial Qualifications" portions of Mr. Michael's applications in Newcastle, Wyoming (BPH-971107MI), Victor, Idaho ((BPH-970815MF), and (BPH-970814ML)), Franklin, Idaho (BPH-970814MM), and Hope, North Dakota (BPH-970925NC), whereby Mr. Michael estimates that he can construct and operate each station for less than \$50,000. Each of these applications are scheduled to be auctioned in the "Closed Broadcast Auction No. 25" on September 28, 1999. Previously, Mr. Michael

² Mountain West's *Comments on Proposed Rule Making*, ¶ 2. Those proceedings in which it has not filed comments have filing deadlines after the deadline for Reply Comments in this proceeding.

certified that he will actively pursue each of these applications, and thus, he will be required to submit an upfront payment of \$80,000 by September 13, 1999. In addition, Mr. Michael will be required to file an FCC Form 175 by August 20, 1999, which contains a provision certifying that Michael Radio Group "is legally, technically, financially, and otherwise qualified pursuant to 308(b) of the Communications Act and the Commission's Rules." *Application to Participate in an FCC Auction*, Certification "1" (Aug. 1998 ed). Assuming that each of the 124 allotments are made by the Commission based on Mountain West's representations to participate in the auction and construct each facility, Mr. Michael will be required to make upfront payments of **\$1,984,000** to actively pursue each allotment!³

Previously, the Commission has stated that "in cases where an applicant has a large number of pending broadcast applications, the staff may question the validity of the applicant's financial certifications." *Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, 2 FCC Rcd 2122 (1987). The Commission has investigated those situations where an applicant improperly has provided financial certifications in more than one application. See *Welch Communications, Inc.*, 5 FCC Rcd 4850 (1990); *Texas Communications Limited Partnership*, 5 FCC Rcd 5876 (1990).

In fact, the Commission has stated that an applicant bears "the burden of showing that [it] was able to meet all his other outstanding financial commitments and the present broadcasting financial proposal." *Breeze Broadcasting Company, Ltd.*, 8 FCC Rcd 1835 (1993). In *Breeze*, an applicant had provided financial certifications relating to 72 LPTV applications, 46 MMDS application, and 30 cellular radio applications. *Id.* ¶6. The Review Board upheld the ALJ's

³ This assumes the minimum upfront payment, \$16,000. However, the average upfront payment in the "Closed Auction" is \$32,312.50, which would require upfront payments of **\$4,006,874** to actively pursue each application, as Mr. Michael has certified he will do.

decision to find that the applicant was not financially qualified to meet the financial obligations for the application at issue, since it was not possible to meet the financial obligations of all the applications on file at the time of making the financial certification. *Id.* ¶ 13.

The need to examine the financial wherewithal of Mountain West *prior to* the grant of the Petition for Rulemaking is especially important now with the introduction of broadcast auctions. Previously, should there have been a financial qualification issue, it would have been resolved through the comparative hearing process. However, now that the Commission only requires the filing of the Short Form FCC 175, an examination of an applicant's financial certification will not be held until *after* the auction. However, in an egregious situation as is present in the instant matter, an examination of Mountain West's financial health must be conducted before anymore of its Petitions for Rulemaking are granted.

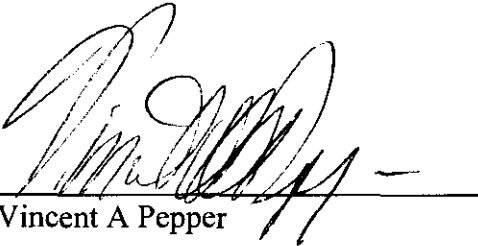
It is clear, therefore, that the Commission must require sufficient financial information to demonstrate that Mountain West has sufficient financial reserves to meet all of its obligations *before* granting the instant Petition for Rulemaking. This is of special need in light of Mr. Michael's substantial underestimation of the costs to construct and operate a new FM station. However, even assuming that Mr. Michael somehow has 130 FM transmitters on reserve, and already owns the transmitter site for each of his allocations, he still must have financial reserves of \$5,850,000.⁴

⁴ Assuming he receives all 130 FM construction permits, and constructs and operates the stations for three months without revenue for \$45,000. Realistically, the average cost for such operations is \$200,000. In that case, Mr. Michael would need to have financial reserves of **\$26,000,000!**

III. CONCLUSION

Thus, Central Nebraska Broadcasting Co., Inc. respectfully requests that the Commission designate the instant proceeding to hearing *prior to* granting Mountain West's Petition for Rulemaking. It is incumbent upon the Commission to ensure that its processes are not abused, and its limited resources expended, by repetitive Petitions for Rulemaking that may very well never be constructed. Mountain West is required to be financially qualified to meet all of its obligations, and it should not be too onerous of a task to require proof of financial health before granting the Petition for Rulemaking.

CENTRAL NEBRASKA BROADCASTING CO., INC.

By: 
Vincent A Pepper

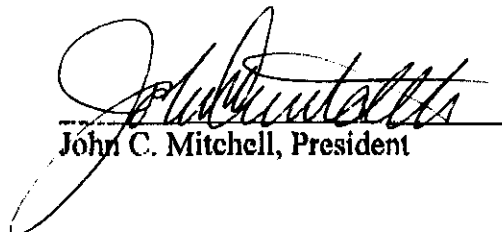
Its Attorney

PEPPER & CORAZZINI, L.L.P.
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(202) 296-0600

July 27, 1999

DECLARATION OF JOHN C. MITCHELL

I, John C. Mitchell, President, declare under penalty of perjury that I have reviewed the foregoing Reply Comments, and I hereby attest that the facts stated therein are true and correct to the best of my personal knowledge.



John C. Mitchell, President

July 19, 1999

EXHIBIT ONE

PETITION FOR RULEMAKINGS AND APPLICATIONS INITIATED AND FILED BY VICTOR A. MICHAEL

| Docket # | RM # | City/State |
|-----------------|-------------|--------------------|
| 99-226 | 9603 | Toquerville, UT |
| 99-224 | 9605 | Parowan, UT |
| 99-223 | 9604 | Leeds, UT |
| 99-222 | 9602 | Fountain Green, UT |
| 99-220 | 9601 | Darby, MT |
| 99-212 | 9640 | Amelia, LA |
| 99-210 | 9629 | Flagstaff, AZ |
| 99-209 | 9628 | Buras, LA |
| 99-208 | 9627 | Melba, ID |
| 99-207 | 9626 | Kuna, ID |
| 99-206 | 9625 | Kimberly, ID |
| 99-205 | 9624 | Hazelton, ID |
| 99-204 | 9623 | Grand View, ID |
| 99-203 | 9621 | Dove Creek, CO |
| 99-202 | 9620 | Mountainaire, AZ |
| 99-195 | 9563 | Wheatland, WY |
| 99-194 | 9562 | Rockford, IA |
| 99-193 | 9561 | Moville, IA |
| 99-192 | 9633 | Ravenna, NE |
| 99-191 | 9632 | Tularosa, NM |
| 99-189 | 9592 | Golden Meadow, LA |
| 99-188 | 9591 | Bruneau, ID |
| 99-187 | 9590 | Summit City, CA |
| 99-186 | 9589 | Mettler, CA |
| 99-185 | 9588 | Maricopa, CA |
| 99-184 | 9587 | Lost Hills, CA |
| 99-183 | 9586 | Herlong, CA |
| 99-182 | 9585 | Hamilton City, CA |
| 99-181 | 9584 | Easton, CA |
| 99-180 | 9583 | Cloverdale, CA |
| 99-179 | 9582 | Kurtistown, HI |
| 99-178 | 9581 | Kihei, HI |
| 99-177 | 9580 | Honokaa, HI |
| 99-176 | 9579 | Holualoa, HI |
| 99-175 | 9578 | Hanapepe, HI |
| 99-174 | 9577 | Hanamaulu, HI |

| | | |
|--------|------|--------------------|
| 99-173 | 9576 | Wahiawa, HI |
| 99-172 | 9575 | Nanakuli, HI |
| 99-171 | 9574 | Carmel Valley, CA |
| 99-166 | 9600 | Elko, NV |
| 99-165 | 9599 | Lovelock, NV |
| 99-164 | 9598 | Mitchell, NE |
| 99-163 | 9595 | Jackpot, NV |
| 99-162 | 9566 | Sutherland, NE |
| 99-161 | 9565 | Hershey, NE |
| 99-160 | 9617 | Overton, NE |
| 99-159 | 9616 | Paxton, NE |
| 99-158 | 9615 | Dexter, NM |
| 99-157 | 9614 | Warrenton, OR |
| 99-156 | 9613 | Pleasant Dale, NE |
| 99-155 | - | Elgin, Oregon |
| 99-152 | 9560 | Captain Cook, HI |
| 99-151 | 9559 | Rangeley, CO |
| 99-150 | 9558 | Poncha Springs, CO |
| 99-149 | 9557 | Dinosaur, CO |
| 99-148 | 9556 | Del Norte, CO |
| 99-147 | 9555 | Congress, AZ |
| 99-137 | 9571 | Amazonia, MO |
| 99-134 | 9543 | Victor, MT |
| 99-133 | 9523 | Evergreen, MT |
| 99-130 | 9517 | Wellington, UT |
| 99-129 | 9541 | Monticello, UT |
| 99-128 | 9520 | Mona, UT |
| 99-127 | 9521 | Kanarraville, UT |
| 99-126 | 9518 | Hurricane, UT |
| 99-125 | 9542 | Huntington, UT |
| 99-124 | 9519 | Castle Dale, UT |
| 99-122 | 9553 | Minatare, NE |
| 99-121 | 9552 | Eagle Nest, NM |
| 99-120 | 9551 | Magdalena, NM |
| 99-119 | 9550 | Shiprock, NM |
| 99-118 | 9549 | Logandale, NV |
| 99-112 | 9540 | Thermal, CA |
| 99-111 | 9539 | Taft, CA |
| 99-110 | 9513 | Westcliff, CO |
| 99-109 | 9512 | Walsenburg, CO |
| 99-108 | 9511 | Sawpit, CO |
| 99-107 | 9510 | La Veta, CO |
| 99-106 | 9509 | La Jara, CO |
| 99-105 | 9508 | Center, CO |

| | | |
|----------|------|--------------------|
| 99-104 | 9507 | Beulah, CO |
| 99-103 | 9506 | Bayfield, CO |
| 99-097 | 9535 | Manville, WY |
| 99-096 | 9534 | Newell, SD |
| 99-095 | 9533 | Dunkerton, IA |
| 99-094 | 9532 | Hinton, IA |
| 99-093 | 9531 | Pleasantville, IA |
| 99-092 | 9530 | Rudd, IA |
| 99-091 | 9529 | Manson, IA |
| 99-090 | 9528 | Socorro, NM |
| 99-089 | 9516 | Caliente, NV |
| 99-088 | 9515 | Wells, NV |
| 99-086 | 9505 | Fruitland, NM |
| 99-085 | 9504 | Overton, NV |
| 99-082 | 9496 | Allen, NE |
| 99-079 | 9488 | Broadview, MT |
| 99-061 | 9448 | Polson, MT |
| 99-060 | 9449 | Fort Benton, MT |
| 99-059 | 9447 | Fairfield, MT |
| 99-057 | 9460 | Upton, WY |
| 99-056 | 9459 | Big Piney, WY |
| 99-055 | 9458 | Thayne, WY |
| 99-049 | 9473 | El Jebel, CO |
| 99-048 | 9472 | Carbondale, CO |
| 99-032 | 9445 | Rye, CO |
| 99-031 | 9444 | Palisade, CO |
| 99-030 | 9443 | Aberdeen, ID |
| 99-029 | 9439 | Walden, CO |
| 99-028 | 9438 | Olathe, CO |
| 99-027 | 9437 | New Castle, CO |
| 99-015 | 9440 | Neihart, MT |
| 99-014 | 9442 | Columbia Falls, MT |
| 99-012 | 9441 | Joliet, MT |
| 98-151 | - | Douglas, WY |
| 98-088 | - | Wright, WY |
| 98-087 | - | Kaycee, WY |
| 97-187 | - | Patterson, IA |
| 97-176 | - | Roscoe, SD |
| 97-119 | - | Victor, MT |
| 971107MI | - | Newcastle, WY |
| 97-061 | - | Superior, MT |
| 97-058 | - | Randolph, Utah |
| 97-057 | - | Hope, ND |
| 97-051 | - | Alberton, MT |

| | | |
|--------|---------|-----------------|
| 97-044 | - | Mills, WY |
| 97-039 | - | Driggs, ID |
| 97-038 | - | Weston, ID |
| 97-037 | - | Victor, ID |
| 97-033 | - | Victor, ID |
| 97-024 | - | Midwest, WY |
| 97-013 | - | Franklin, ID |
| 96-243 | - | Chugwater, WY |
| 96-227 | - | Glenrock, WY |
| 96-218 | - | Windsor, NY |
| 96-151 | - | Bear Creek, PA |
| | 9641 | Kootenai, ID |
| | 9630 | Winona, AZ |
| | 9537 | Alberton, MT |
| | PRM99MM | Caliente, CA |
| | PRM99MM | Cortez, CO |
| | PRM99MM | Cottonwood, TX |
| | PRM99MM | Fritch, TX |
| | PRM99MM | Kula, HI |
| | PRM99MM | Kuna, ID |
| | PRM99MM | Littlefield, AZ |
| | PRM99MM | Murphy, ID |

EXHIBIT TWO

Excerpts from FCC Form 301 – SECTION III - Financial Qualifications:

- Newcastle, Wyoming – BPH-971107MI;
- Victor, Idaho – BPH-970815MF;
- Victor, Idaho – BPH-970814ML;
- Franklin, Idaho – BPH-970814MM; and
- Hope, North Dakota – BPH-970925NC.

SECTION III - FINANCIAL QUALIFICATIONS

NOTE: If this application is for a change in an operating facility do not fill out this Section.

1. The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue. ☒ Yes ☐ No
2. State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue. \$ 42,100.00
3. Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

| Source of Funds (Name and Address) | Telephone Number | Relationship | Amount |
|--|------------------|--------------|---|
| VICTOR A. MICHAEL JR. 7901 STONERIDGE DRIVE CHEYENNE, WY 82009 | 307-632-7162 | PARTNER | \$25,000 |
| VAN A. MICHAEL 8910 BLUE MESA CHEYENNE, WY 82009-8402 | 307-638-3726 | PARTNER | \$25,000 |
| | | | Channel 222A Victor, Idaho BPH-970814ML |

SECTION III - FINANCIAL QUALIFICATIONS

NOTE: If this application is for a change in an operating facility do not fill out this Section.

1. The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue. ☒ Yes ☐ No
2. State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue. \$ 42,250
3. Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

| Source of Funds (Name and Address) | Telephone Number | Relationship | Amount |
|---|------------------|--------------|--------------|
| Victor A. Michael, Jr. 7901 Stoneridge Drive Cheyenne, WY 82009 | 307-632-7162 | Partner | \$ 25,000.00 |
| Van A. Michael 8910 Blue Mesa Cheyenne, WY 82009 | 307-638-3726 | Partner | \$ 25,000.00 |
| Channel 257A New Castle, Wyoming BPH-971107MI | | | |

SECTION III - FINANCIAL QUALIFICATIONS

NOTE: If this application is for a change in an operating facility do not fill out this Section.

1. The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue.

☒ Yes ☐ No
2. State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue.

\$ 42,100.00
3. Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

| Source of Funds (Name and Address) | Telephone Number | Relationship | Amount |
|--|------------------|--------------|---|
| Victor A. Michael, Jr. 790 Stoneridge Drive Cheyenne, WY 82009 | (307) 632-7162 | Partner | 25,000 |
| Van A. Michael 8910 Blue Mesa Cheyenne, WY 82009-8402 | (307) 638-3726 | Partner | 25,000 |
| | | | Channel 282A Victor, Idaho BPH-970815MF |

SECTION III - FINANCIAL QUALIFICATIONS

NOTE: If this application is for a change in an operating facility do not fill out this Section.

1. The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue ☒ Yes ☐ No
2. State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue. \$ 45,250.00
3. Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

| Source of Funds (Name and Address) | Telephone Number | Relationship | Amount |
|--|------------------|--------------|-------------|
| VICTOR A. MICHAEL JR. 7901 STONERIDGE DRIVE CHEYENNE, WY 82009 | 307-632-7162 | PARTNER | \$25,000.00 |
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Channel 284A
Hope, North Dakota
BPH-970925NC

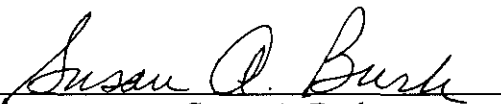
CERTIFICATE OF SERVICE

I, Susan A. Burk, a secretary with the law firm of Pepper & Corazzini, L.L.P., do hereby certify that a true and correct copy of the foregoing "REPLY COMMENTS" was hand-delivered to the following individuals on the 27th day of July, 1999:

Roy J. Stewart, Esquire
Chief, Mass Media Bureau
Federal Communications Commission
Mass Media Bureau
The Portals
445 - 12th Street, S.W.
Washington, DC 20554

Ms. Leslie K. Shapiro
Federal Communications Commission
Policy and Rules Division
Mass Media Bureau
The Portals
4454 12th Street, S.W.
Washington, DC 20554

A. Wray Fitch, III
Gammon & Grange
8280 Greensboro Drive
7th Floor
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Susan A. Burk